No. 9990

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF FORSYTH and FAIRBANKS, MORSE & COMPANY,
Appellants,

vs.

MOUNTAIN STATES POWER COMPANY,
Appellee.

APPELLANTS' BRIEF.

H. V. BEEMAN,
Attorney for City of Forsyth,
Residence and Post Office Address:
Forsyth, Montana.

KYLE & KYLE,
Attorneys for Fairbanks, Morse & Company,
Residence: St. Paul, Minnesota.
Post Office Address: 618 Guardian Bldg.

POPPENHUSEN, JOHNSTON, THOMPSON
& RAYMOND,
of counsel,
Chicago, Illinois.

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STATEMENT OF CASE.

This is an appeal from a judgment on the pleadings in favor of appellee entered on the 21st day of May, 1941, in the District Court of the United States for the District of Montana, Billings Division, Honorable Charles N. Pray, Judge, upon the motion of the appellee, said judgment enjoining the appellant Fairbanks, Morse & Co. from constructing an electric light, heat and power plant in and for the appellant City (70-71*). It is contended by the appellants *inter alia* that the District Court had no jurisdiction to enter the said judgment because not only does it not appear upon the face of the pleadings that the District

*The figures in brackets are the pages from which the text is taken.

Court had jurisdiction, but because it affirmatively appears on the face of the pleadings that the District Court had no jurisdiction for the following reasons:

(a) Because the allegation in the complaint that "the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000" (3) is denied by the answers (23, 31), and neither the complaint nor the answers otherwise show jurisdiction.

(b) The appellee has not any exclusive franchise to occupy the streets of the City of Forsyth with its electrical equipment; therefore no property right, legal or equitable, of the appellee is invaded, and the appellee has no standing to maintain this action.

Other questions raised in addition to those above stated are set out in the specification of errors.

STATEMENT OF PLEADINGS AND OF THE ADMITTED ALLEGATIONS THEREIN.

It is alleged in the complaint and admitted in the answers that the City of Forsyth is a Municipal corporation organized under the laws of the State of Montana; that Fairbanks, Morse & Co. is a corporation organized under the laws of the State of Illinois; that the appellee is a corporation of the State of Delaware, according to the admission of the answer of Fairbanks, Morse & Co. (29), but this allegation is denied by the answer of the appellant City (23).

Paragraphs II, III, IV, V and VI of the complaint (3-13) are admitted by the answers (22, 23) and (29-30). In the admitted paragraphs of the complaint the material allegations are that the appellee is, and has been for several years, the owner of an electric light and power plant in the

City of Forsyth, Montana, and has been engaged in furnishing electric light and power to the said City and its people (3); that the appellant City published in the Forsyth Independent on the 18th of April, 1940, a notice, copy of which is attached to the complaint and marked "Exhibit A" (3). This notice invited bids for the construction of a municipal light, heat and power plant for the City, the bids to be received on the 25th day of April, 1940, stated that the contract price would be paid solely out of the net earnings of the plant, and that any bids received or accepted would be subject to the approval of the resident taxpayers of the City at an election at which the proposed contract would be submitted. The notice further stated that if the proposed contract was approved by the resident taxpayers a formal contract would be entered into, but that if the contract was disapproved, then the acceptance by the City would be null and void (17-18). The specifications upon which bids were invited contained the provisions set out in paragraphs IV, V, and VI of the complaint (4-12), said provisions being the same as those contained in the notice to bidders as above set forth, and further provided that if the validity of the contract should be questioned by a suit in Court and the contract upon final determination should be held illegal and void, then neither party should be liable for damages thereunder (5).

The specifications further provided that the contractor would not be required to begin work until ten (10) days after litigation, looking towards the ousting of the power company serving the City from its streets had been finally determined in favor of the City; that the City would institute such legal action as might be deemed advisable to have

it declared by a Court of competent jurisdiction that the public service corporation, meaning the appellee herein, had no right to use or occupy the streets with its poles, wires or other instrumentalities, and that it be required to remove all of its equipment therefrom when the proposed plant of the City was ready for operation so that the City should be free of its competition (5-6).

The specifications further provided that the title to the entire plant should remain in the contractor until the purchase price was paid with interest; that the entire plant until it was fully paid for should at all times remain personal property; that the payment of the contract let under the specifications should be made solely out of the net earnings of the light and power plant to be constructed; that any earnings in excess of the amount required to make the payments of principal and interest on the contract should be used to pay for extensions and additions to the plant and to anticipate payments of princial and interest on the contract (7); that the City did not guarantee to pay the contract price absolutely and at all events; that the contract price should in no event be or become a general obligation of the City or create any indebtedness against it or be payable out of taxes or out of its general revenues, but payment therefor would be made solely out of the net earnings of the plant and not otherwise (7-8); that the payments to be made should be in installments of $1,250.00 out of the net earnings of the plant, beginning on the first day of the sixth month after commencement of operation, and a like sum on the first day of each and every month thereafter until half of the contract price was paid, and $1,500.00 on the first day of each and every month after

half the contract price was paid until the total price was paid in full. There were in the specifications provisions determining the rate of interest, determining what notice should be given in case of default (9); providing for the issuance of revenue certificates to evidence the payments to be made under the contract; providing that the schedule of rates should not exceed certain specified rates during the life of the contract (10-11); that skilled and common labor for the construction of the plant should be secured in the City of Forsyth so long as a competent supply was available; that the contractor should not be required to commence performance while litigation was pending; that the City would furnish any rights-of-way required over private property; that Fairbanks, Morse & Co. filed a bid in the sum of $169,969; that the Council of the City accepted the bid, subject to the approval of the taxpaying electors (12); that at an election held on the 25th of May, 1940, the question of approving or disapproving the proposed contract was submitted to the taxpaying electors and that a majority of them approved the proposed contract.

The other allegations of the complaint, that is to say, those contained in paragraphs VII to XV, inclusive, were denied. In paragraph VII it was alleged that the City was without power or authority to make or enter into the proposed contract, and if the contract was entered into and the plant constructed as provided for therein, the City would become a competitor of appellee and take from it many of its customers and patrons to its great irreparable damage and injury (13). In paragraph VIII it was alleged that the City in making and entering into the contract was assuming to exercise power and authority conferred by Chap-

ter 115 of the Laws of Montana of the Year 1937, as amended by Chapter 111 of the Laws of Montana for the year 1939; that the emergency mentioned in Chapter 115, as amended, had ceased to exist and that there had not been since long prior to the month of April, 1940, such a condition or situation as is described and recited in said Chapter 115, and that said Chapter 115, as amended, was not and had not been since long prior to the month of April, 1940, of any force or effect; that if the said emergency still existed the said Chapter 115, as amended, would not confer any power or authority on the appellant City to make or enter into the proposed contract (13-14). In paragraph IX it is alleged that Chapter 115, aforesaid, is unconstitutional and void because the emergency mentioned therein is to be determined by the opinion of the Governor, whereas said question is a judicial question for determination by the Courts (14). In paragraph X it is alleged that the appellee has a franchise by virtue of Section 6645 of the Revised Codes of Montana for 1935 to occupy the streets, alleys and public grounds with its poles and wires, and the right to furnish electric light and power to the City and its inhabitants, and that the action of the City in advertising for bids, holding the election and proposing to enter into the contract cast a cloud upon the title of the appellant to said franchise and its right to furnish electric light and power to the City and its inhabitants (14). In paragraph XI it is alleged that the contract is void for want of mutuality for the reason that it is optional with Fairbanks, Morse & Co. to proceed or not to proceed with the construction of the said plant (14-15). In paragraph XII it is alleged that the provision of the contract with

reference to rates is void because rates must be fixed and prescribed by the Public Service Commission of Montana; that by agreeing that the rate should never be in excess of those provided in the contract, the City perpetrated a fraud on the electors that voted at the election, and if the electors had been informed that said rates might be increased at any time many of them who approved of the contract at the election would have voted against it. That the number of those persons is unknown to appellant, but that appellant alleges that, except for said fraud, the said proposed contract would not have been approved (15). In paragraph XIII it is alleged that the plans and specifications for the plant were prepared by or under the direction of the appellant Fairbanks, Morse & Co., and were so prepared as to prevent any competition in the bidding, the consequence of which was that the only bid presented was the bid of the said Fairbanks, Morse & Co. as was intended by said Company and the City (15). Paragraph XIV alleges that the appellee is, and has been for several years, a large taxpayer upon both real and personal property in the City (16), and that the appellee has no adequate remedy at law (16).

In addition to the denials aforesaid, the appellants allege that the City in making and entering into the contract in question is proceeding under the authority conferred upon it by the statutes of the State of Montana, and the decisions of the Supreme Court, including the statutes referred to in paragraph XIII of the complaint, namely Chapter 115 Laws of 1937, as amended, and claims that under said laws and statutes it has full power and authority to enter into the contract aforesaid, and to establish a

municipal light, heat and power plant (23). The answers further allege that on or about the 15th of October, 1904, one, John E. Edwards, obtained a franchise from the Town of Forsyth, Montana, to construct and maintain an electric light plant in the said Town by virtue of an ordinance numbered 32, which is attached to the answer of the appellant City as "Exhibit A"; in and by which ordinance there was granted to the said John E. Edward, his heirs, executors, administrators and his assigns, for a period of twenty (20) years, the privilege of constructing, maintaining and operating an electric light plant in the said Town of Forsyth; that the ordinance was duly submitted to the resident freeholders and taxpayers of the Town for rejection or approval at an election which was duly called and held, and at said election the ordinance was approved; that the appellant City of Forsyth is the successor of the said Town of Forsyth; that the appellee is the assignee of the said John E. Edwards, by him or by *mesne* conveyances, and that the appellee derived its right to occupy the streets and alleys of the City from said ordinance numbered 32 and not otherwise; that the right to occupy the streets under said ordinance has long since expired and that the appellee at the time of the commencement of this action was occupying the streets and alleys of the City solely during the will and pleasure of the appellant City; a true and correct copy of the ordinance is attached to the answer marked "Exhibit A" (24-25); the answers further allege that on the 26th of September, 1905, John E. Edwards organized a corporation under the name of the Forsyth Electric Light and Power Company for the purpose of generating and furnishing electric light and power for

public and private use in the Town of Forsyth; that the term for which the corporation was organized was twenty (20) years from the 26th of September, 1905, and that thereafter the Forsyth Electric Light and Power Company changed its name to the Forsyth Light and Power Company, and that said last mentioned corporation is the assignor of the appellee herein, and the corporation from which it acquired whatever rights it claims to have in the streets and alleys of the City of Forsyth; that at the time of the attempted transfer of the said franchise to the appellee, the assignor had no rights to transfer, and that the appellee acquired no rights by virtue of any transfer or assignment from John E. Edwards or any of his assignees (25-26).

On the motion for judgment on the pleadings, denials and allegations of the answer, which are well pleaded, must be taken as true. *Beal v. Missouri Pacific Railroad Company,* 61 S. Ct. 418, 312 U. S. 45.

SPECIFICATION OF ERRORS.

I.

The court erred in granting appellee's motion for judgment on the pleadings in its favor for the following reasons:

(a) The allegation in the complaint that the amount in controversy exceeds $3,000, exclusive of costs, (3) is denied by the answers (23-31), and there is no other allegation either in the complaint or in the answers sustaining the jurisdiction.

(b) The purchase price of the electric light and power plant, namely $169,969 is not the amount or matter in con-

troversy between the appellants and the appellee, and is not the test of jurisdiction.

(c) The appellee, not having any exclusive franchise, has no legal right to be free of the competition of the appellant City in the production, sale and distribution of electricity for itself and its inhabitants, and, therefore, any loss or damage resulting from such competition is *damnum absque injuria.*

(d) Inasmuch as the appellee has no exclusive franchise no legal or equitable right of the appellee is invaded by the proposal or intention of the City to establish its own electric light plant, and, therefore, the appellee has no standing to maintain this action.

(e) Even if the contract between the appellant City and Fairbanks, Morse & Co. is *ultra vires,* the appellee on the face of the pleadings has no standing to maintain this action because there is no amount in controversy between the appellee and appellants.

II.

The Court erred in holding in granting said motion for judgment on the pleadings that the contract between the City and Fairbanks, Morse & Co. was invalid (71).

III.

The Court erred in holding and in adjudging (65, 71) that the appellee has a valid and existing franchise for the maintenance and operation of its electric plant and system in said City.

IV.

The Court erred in holding in granting said motion for judgment on the pleadings that the construction and operation of the municipal light and power plant according to the terms and provisions of said contract would constitute illegal competition with appellee's electric plant and system.

SUMMARY OF POINTS AND AUTHORITIES.

It was conceded in the Court below that the contract in question does not create an indebtedness, and that the appellee has no exclusive franchise. The argument of the appellants proceeds upon that basis.

I.

The District Court erred in granting appellee's motion for judgment on the pleadings because:

(a) The allegation of the amount requisite to confer jurisdiction is denied by the answers.

McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780;

Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 960;

KVOS Incorporated v. Associated Press, 299 U. S. 269, 57 S. Ct. 197;

Kroger Grocery & Baking Co. v. Lutz, 299 U. S. 300, 57 S. Ct. 215;

Buck v. Gallegher, 307 U. S. 95, 59 S. Ct. 740;

Green v. Tacoma, 57 F. 562;

Reese v. Holm, 31 F. Supp. 435;
Kurn v. Beaseley, 109 F. (2d) 687;
S. S. Kresge v. Amsler, 99 F. (2d) 503;
Colony Coal & Coke Corporation v. Napier, 28 F. Supp. 143.

(b) The purchase price of the electric light and power plant, namely $169,969, is not the amount or matter in controversy between the appellants and the appellee and is not the test of jurisdiction.

McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780;
Kroger Grocery & Baking Co. v. Lutz, 299 U. S. 300, 57 S. Ct. 215;
Gibbs, et al v. Buck, 307 U. S. 66, 59 S. Ct. 725;
Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700, 702;
Glenwood L. & W. Co. v. Mutual etc. Co., 239 U. S. 121, 36 S. Ct. 30;
S. S. Kresge v. Amsler, 99 F. (2d) 503 (8 Cir.);
Snively Groves v. Florida Citrus Commission, 23 F. Supp. 600;
Gavica v. Donaugh, 93 F. (2d) 173 (9 Cir.);
Miller v. First Service Corporation, 84 F. (2d) 680;
Carl Fischer Incorporated v. Shannon, 26 F. Supp. 727 (D. C., Mont.);
Electro Therapy Products Corporation, Ltd. v. Strong, et al, 84 F. (2d) 766.

(c) The appellee, not having an exclusive franchise, has no legal right to be free of the competition of the appellant City in the production, sale and distribution of electricity for itself and its inhabitants, and, therefore, any loss or

damages resulting from such competition is *damnum absque injuria.*

Larson v. State of South Dakota, 278 U. S. 429, 49 S. Ct. 196, affirming 215 N. W. 880, 51 S. D. 561;

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366;

Alabama Power Company v. Ickes, 302 U. S. 464, 58 S. Ct. 300, affirming 91 F. (2d) 303;

Western Tennessee Power and Light Company v. City of Jackson, 97 F. (2d) 979, affirming 21 F. Supp. 57;

Clark v. City of Los Angeles, 116 Pac. 722, 160 Cal. 30;

Western Public Service Co. v. Minneatre, 99 F. (2d) 844.

(d) Inasmuch as the appellee has no exclusive franchise, no legal or equitable right of the appellee is invaded by the proposal or the intention of the City to establish its own electric light plant, and, therefore, the appellee has no standing to maintain this action.

Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366;

Southwestern Gas & Electric Co. v. City of Texarkana, 104 F. (2d) 847, petition for writ of certiorari denied; 60 S. Ct. 110, 308 U. S. 586;

Northwest Light & Power Co. v. Town of Milford, 82 F. (2d) 45;

Alabama Power Co. v. Ickes, 91 F. (2d) 303;

Duke Power Co. v. Greenwood, 91 F. (2d) 665;

Georgia Power Co. v. Tennessee Valley Authority, 14 F. Supp. 673;

Missouri Utility Company v. The City, 14 F. Supp. 613;

Carolina Power & Light Co. v. South Carolina Public Service Company, 94 F. (2d) 520;

Washington Water Power Co. v. City of Coeur d'Alene, 24 F. Supp. 790;

Colorado Life Co. v. Steele, 99 F. (2d) 535.

(e) Even if the contract between the appellant City and Fairbanks, Morse & Company, is *ultra vires,* the appellee on the face of the pleadings has no standing to maintain this action.

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, affirming 21 F. Supp. 947;

Colorado Life Company v. Steele, 95 F. (2d) 535;

Wright v. Mutual Life Insurance Company of New York, 19 F. (2d) 117;

Greenwood County v. Duke Power Company, 81 F. (2d) 986, 987;

Washington Water Power Company v. The City of Coeur d'Alene, 24 F. Supp. 790;

Alabama Power Co. v. Ickes, 91 F. (2d) 303;

Memphis Power & Light Co. v. City of Memphis, 112 S. W. (2d) 817, 172 Tenn. 346;

Western Public Service Co. v. Miniatare, 99 F. (2d) 844;

Duke Power Co. v. Greenwood, 91 F. (2d) 665.

(f) The Court erred in holding in granting said motion for judgment on the pleadings that the construction and operation of the municipal light and power plant according to the terms and provisions of said contract would con-

stitute illegal competition with appellee's electric plant and system.

Cases Supra, particularly those under 1e.

II.

The Court erred in holding in granting the motion for judgment on the pleadings that the contract between the City and Fairbanks, Morse & Company was invalid. Specifically the Court held that Section 5039.63 of the Revised Codes of Montana for 1935 was exclusive in the sense that a lighting plant could only be erected by the issuance of bonds. Said section is as follows:

> "The city or town council has power: To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: Erection of * * * lighting plants * * *."

Appellants contend that the statute contains a grant of power and not a limitation of the power of the City; in other words, the statute is permissive and not exclusive.

Lang v. Cavalier, 59 N. D. 75, 228 N. W. 819;

Williams v. Village of Kenyon, 187 Minn. 161, 244 N. W. 558;

Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114;

Farmers & Merchants State Bank v. City of Conrad, 100 Mont. 415, 47 Pac. (2d) 853;

Kelly v. Merry, 186 N. E. 425, 262 N. Y. 151;

Milligan v. Miles City, 51 Mont. 374, 153 Pac. 276;

See also Sections 4955, 4958, 5039.1, 5039.7, 5039.4, all of Revised Codes, 1935; Chap. 115, Laws of 1937 of

the State of Montana, as amended by Sec. 10, Chap. 111, Laws of 1939 for other authority.

As to right of a city to acquire a plant on credit payable out of its own earnings, see:

McQuillin on Municipal Corporations, Sec. 366, P. 968, Vol. I;

44 C. J., P. 66, Sec. 2124;

McQuillin on Municipal Corporations, Sec. 2322;

43 C. J., P. 1338, Sec. 2097;

Farmers & Merchants State Bank v. City of Conrad, 100 Mont. 415, 47 Pac. (2d) 853;

Barnes v. City of Lehi, 74 Utah 321, 279 Pac. 878;

Johnston v. City of Stuart (Ia.), 226 N. W. 164;

City of Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004;

Searle v. Town of Haxtun, 84 Colo. 494, 271 Pac. 629;

Bell v. City of Fayette, 28 S. W. (2d) 356, 325 Mo. 75;

Winston v. Spokane, 12 Wash. 524, 41 Pac. 888;

Shields v. Loveland, 74 Colo. 27, 218 Pac. 913;

Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365;

Seward v. Bowers, 24 Pac. (2d) 253, 37 N. M. 385;

Kelly v. Merry, 186 N. E. 425, 262 N. Y. 151;

Franklin Trust Co. v. City of Loveland, 3 F. (2d) 114;

Underwood v. Fairbanks, Morse & Co., 185 N. E. 118, 205 Ind. 316;

Ward v. City of Chicago, 173 N. E. 810, 342 Ill. 167;

(Notes in 72 A. L. R. 687 and 96 A. L. R. 1385.)

As to the contract being lacking in mutuality, there is no basis whatever for this holding:

13 C. J., P. 13, Sec. 158, and cases cited.

III.

The Court erred in holding that the appellee has a valid and existing franchise for the maintenance and operation of its electric plant and system in said City (65, 71); said holding being based upon Section 6645 of the *Revised Codes of Montana.* Appellants contend that no franchise is obtainable under said Section without the consent of the City, there being no repealing clause in the statute, and in view of the powers reserved in the Act to the City and its power over the streets of the City as recited in Sections 5039.7, 5039.42, 5074, 5075, 5076, 5077, all of *Revised Codes* 1935.

McQuillin on Municipal Corporations, 2nd Ed., Sec. 1745.

IV.

The Court erred in holding in granting said motion for judgment on the pleadings that the construction and operation of the municipal light and power plant according to the terms and provisions of the contract between the appellant City and the appellee would constitute illegal competition with appellee's electric plant and system.

The contract is legal under the authorities cited under Subdivision II above, and even if it were illegal, the appellee has no standing to maintain the action under the authorities cited under I (e) above.

ARGUMENT.

I.

As to error I *(a): that the District Court had no jurisdiction because the allegation in the complaint that the amount in controversy exceeds $3,000, exclusive of costs, is denied by the answers and there is no other allegation either in the complaint or in the answers sustaining the jurisdiction.*

It seems unnecessary to elaborate on this proposition.

In *McNutt v. General Motors Acceptance Corporation,* 299 U. S. 178, 56 S. Ct. 780, the Court said:

> "As he (meaning the plaintiff) is seeking relief subject to this supervision (namely the supervision of the Court), it follows that he must carry throughout the litigation the burden of showing that he is properly in Court. * * * If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof, and where they are so not challenged, the Court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the Court may demand that the party alleging jurisdiction justify his allegation by a preponderance of evidence * * * Here the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The Court made no finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction, and the bill should have been dismissed upon that ground."

See also the other cases cited under "Summary of Points and Authorities" I (a).

As to error I (b), to-wit:

> *The purchase price of the electric light and power plant, namely $169,969, is not the amount or matter in controversy between the appellants and the appellee, is not the test of jurisdiction."*

The gravamen of the appellee's complaint is contained in paragraph VII (13) wherein it is alleged:

> "If said contract is entered into and said plant or system is constructed as provided in said contract, the said City will become the competitor of plaintiff and take from plaintiff many of its customers and patrons to its great irreparable damage and injury."

What the Appellee claims, therefore, is a right to be free of the competition of the City. If it had an exclusive franchise, the value of the right to be free of competition would be the amount or matter in controversy between the appellee and the appellants, but inasmuch as it has no exclusive franchise, it has no right to be free of competition, and, therefore, suffers no legal loss or damage.

The appellee has no cause of action against the appellants, or either of them, based upon the contract for the construction of the plant and could not recover any judgment against them, or either of them, on that score. The allegation in the complaint of the amount of the contract for the construction of the plant is wholly immaterial. The gist of the appellee's complaint is that the appellant City is proposing to establish its own plant and thereby threatening to destroy the appellee's business as purveyor

of electricity. It does not make any difference what the cost of the plant is or may be. The situation would be the same if there was no cost alleged in the complaint, or if the City was being made a present of the plant.

In *McNutt v. General Motors Acceptance Corporation* there were allegations as to the net worth of the business which it conducted in Indiana, the value of the contracts which it purchased, the aggregate value of the contracts, its aggregate sales, and other allegations concerning its business, but the Court held that they were immaterial. Respecting these allegations the Court said:

> "The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the statutory regulation. *The object or right to be protected against unconstitutional intervention is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They failed to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue, and the record discloses neither finding or evidence to sustain it."

In the case at bar, as the appellee has no right to be free of competition, it can sustain no legal loss by competition, and, therefore, the jurisdictional amount is not involved, nor is any amount involved.

In the case of *Gavica v. Donaugh, U. S. Attorney,* (C. C. A. 9th Cir.) 93 F. (2d) 173, it is held:

* * * * *

> "(2) Matters in controversy, as used in statute providing the District Court shall have original jurisdiction in all suits in which the matter in controversy exceeds $3,000, are *the rights which plaintiffs assert and seek to have protected and enforced."* (Judicial Code, Section 24 (1), 28 U. S. C. A. Section 41 (1).

In the case at bar the right which the appellee asserts and seeks to have protected and enforced is the right to be free of competition. It has no such right. But certainly the matter in controversy is not the amount of the contract for the construction of the electric light plant.

In *Electro Therapy Products Corporation, Ltd. v. Strong, et al.,* 84 F. (2d) 766, the plaintiffs claimed that there was an agreement between them and the defendants that defendants would execute at their request all papers necessary to assign and set over to them the title to certain inventions and letters patent, and that the appellents refused to do so. The bill alleged the matter in controversy exceeded the value of $3,000, exclusive of interest and costs. The Court held that the matter in controversy is the *right which the plaintiffs assert and seek to have protected and enforced,* namely the right to have the inventions assigned to plaintiffs and to no one else, and that the District Court's jurisdiction is to be tested by the value of that right. *Citing McNutt v. General Motors Acceptance Corporation,* supra. There was no proof that the value of the inventions exceeded $3,000, and the Court held

that the Trial Court's finding that the matter in controversy exceeded $3,000 had no support in the evidence and that the bill should have been dismissed.

In *Gibbs, et al. v. Buck,* 307 U. S. 66, 59 S. Ct. 725, it is held:

> "Where the matter in controversy is the right to conduct and carry on a business, and that business has been prohibited by state statute, the *issue on jurisdiction is the value of the right to conduct the business free from the prohibition set up by the statute.*"

In *Colony Coal & Coke Corporation v. Napier,* 28 F. Supp. 76, it is held:

> "In a suit for an injunction the amount involved for the purpose of determining the jurisdiction of the Federal Court *is the value of the right to be protected, or the extent of the injury to be prevented.*"

And in *Snively Groves, Incorporated v. Florida Citrus Commission,* 33 F. Supp. 600, it is held:

> "In a suit to enjoin the enforcement of a rule or regulation, the amount in controversy necessary to invoke jurisdiction of a Federal Court *is to be measured by the value of the right to be free of the rule or regulation complained of.*"

In the case of *Carl Fischer, Incorporated v. Shannon,* 26 F. Supp. 727, there was a suit by publishers, authors and composers to enjoin enforcement of a Montana statute regulating the pooling of separate interests in certain copyrighted works. Complainants' evidence, which was confined to the value of the copyrights owned and the cost of preparing a list of pooled copyrighted works required by

statute, but not disclosing the value of the right to carry on the business free of the Montana regulation nor of the amount of loss which would result from compliance with the statute, nor that cost of compliance would not be returned at greater income, was insufficient to establish jurisdictional amount.

In *Colorado Life Company v. Steele,* 95 F. (2d) 535, it is held:

> "If, from the nature of the case as stated in the petition, there could not legally be a judgment for the amount necessary for the jurisdiction, jurisdiction cannot attach even though the damages laid in the petition are at a sum larger than the jurisdictional amount."

In the case at bar the matter in controversy is the claimed right to be free of competition, and as there is no such right as a matter of law, there is no loss or damage.

As to errors I (c), *The appellee not having any exclusive franchise has no legal right to be free of the competition of the appellant City in the production, sale and distribution of electricity for itself and its inhabitants, and therefore, any loss or damage resulting from such competition is damnum absque injuria";*

I (d) *"Inasmuch as the appellee has no exclusive franchise, no legal or equitable right of the appellee is invaded by the proposal or the intention of the City to establish its own electric light plant, and, therefore, the appellee has no standing to maintain this action";*

I (e), *"Even if the contract between the appellant City and Fairbanks, Morse & Co. is ultra vires the appellee on the face of the pleadings has no standing to maintain this action";* and

I (f), *"The Court erred in holding in granting said motion for judgment on the pleadings that the construction and operation of the municipal light and power plant according to the terms and provisions of said contract would constitute illegal competition with appellee's electric plant and system."*

These errors are so interrelated that they may be considered together:

The case of *Tennessee Electric Power Company v. Tennessee Valley Authority,* 306 U. S. 118, 59 S. Ct. 366, affirming 21 F. Supp. 947, covers all of the propositions involved. The appellants, or most of them, in that case had local franchises, but none of them had an exclusive franchise. They sought to restrain the Tennessee Valley Authority, and other corporations, from generating electricity and water power created or to be created, under the Tennessee Valley Authority, and for other relief, claiming that the plan of the Tennessee Valley Authority contravened the constitution of the United States, and that the acts of the defendants would destroy the business of the plaintiff. The Court said:

> "It is clear, therefore, that its acts (that is, the acts of the Tennessee Valley Authority) have resulted, and will result, in the establishment of municipal and cooperative distribution systems competing with those of some, or all, of the appellants in territories which they now serve or reasonably expect to serve by extension of their existing systems, and in direct competition with the appellants' enterprise through the sale of power to industries in the areas now served by them or which they can serve by expansion of their facilities. The appellants assert that this competition will inflict substantial injury upon them. The appellees

> admit that such damage will result, but contend that it is not the basis of a cause of action since it is *damnum absque injuria*—a damage not consequent upon the violation of any right recognized by law."

The appellants invoked the doctrine that one threatened with injury by an agent of a government which, but for statutory authority for its performance, would be a violation of its legal rights may challenge the validity of the statute in a suit against the agent. With respect to this the Court said:

> "The principle is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one funded on a statute which confers a privilege. The appellants further urge that the Tennessee Valley Authority, by competing with them in the sale of electrical energy, is destroying their property and rights without warrant, since the claimed authorization of its transactions is an unconstitutional statute. The pith of the complaint is the Authority's competition."

The appellants further claimed that the franchise to be a public utility was a species of property which was directly taken or injured by the Authority's competition, and they urged that their local franchises, though non-exclusive, are property which the Authority is destroying by its competition, and since what was being done is justified by a reference to the Tennessee Valley Authority Act, which they claim is unconstitutional, they say they have a standing to challenge its constitutionality. With respect to which the Court said:

> "The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation and to function as a public utility in the absence of a specific charter contract on the subject creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field. The local franchise, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise. The grantor may preclude itself by contract from initiating or permitting such competition, but no such contractual obligation is here asserted."

The appellants further argued that if the invasion of their franchise rights does not give them a standing, they may challenge the constitutionality of the grant of power, the exercise of which results in competition. To which the Court said:

> "This is but to say that if the commodity used by a competitor was not lawfully obtained by it, the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum*

absque injuria, and will not support a cause of action or a right to sue." (Citing numerous cases in the foot note.)

In the case of *Alabama Power Company v. Ickes,* 91 F. (2d) 303, it was claimed that the defendants were furnishing loans to the municipalities to enable them to construct municipal light and power plants which would enter into competition with the plaintiff, and they claimed that the statute was unconstitutional. The Court held that whether or not the statute was unconstitutional was immaterial because the plaintiff, having no exclusive franchise, no legal or equitable right of the plaintiff was invaded, and, therefore, they were without standing to challenge the validity of the administrator's acts. The Court said:

> "Plaintiff's right to be heard in a judicial tribunal resolves itself to the single question of whether or not there has been an invasion of some legal or equitable right. The mere damage that may arise from the competition of municipalities does not amount to an infringement or impairment of any such right, nor does the mere making of loans and grants by the administrator of public works, *although he may be acting beyond the warrant of law,* amount to an impairment of the legal or equitable rights of the plaintiff."

In *Washington Water Power Company v. City of Coeur d'Alene,* 24 F. Supp. 790, it is held:

> "An electric company operating under a non-exclusive franchise has no standing to question the validity of a statute authorizing Federal loans and grants for construction of power plants by municipalities."

If it has no standing to question the validity of such a statute, it follows that it has no standing to question the validity of a contract made by a municipality in Montana to construct a municipal light and power plant. The Court said:

> "The validity of the act of Congress no longer remains in question in the case since the decision of the Supreme Court in the case of *Alabama Power Company v. Ickes, Federal Administrator of Public Works, et al,* 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 381, where the Court held that *even though the Administrator was without authority to make the proposal loan and grant,* yet a company operating under a non-exclusive franchise had no standing to question the validity of the statute authorizing the loan and grant under the Federal Constitution."

The case quotes from *Milligan v. Miles City,* 51 Mont. 374, 153 Pac. 276, 278, L. R. A. 1916 C. 395 as follows:

> "When a city is engaged in operating a municipal plant under an authority granted by a general law, it acts in a proprietary or business capacity, and in this behalf it stands upon the same footing as a private individual or business corporation similarly situated."

The decision cites a long list of cases upholding the power of the state and municipality to enter into contracts with the public works administrator on such terms as might be agreed upon, and further said:

> "These contracts are simply business agreements that the respective parties have a lawful right to enter into, and which appear to us to be reasonable and free from any constitutional restraint. Complainant, no doubt, feels aggrieved that these governmental agencies are prepared to compete with it in the sale of electrical energy,

but that does not render the contracts here invalid." (Citing many cases.)

In *Greenwood County v. Duke Power Company,* 81 F. (2d) 986, 987, the Court, speaking through Judge Parker, said:

> "For the reasons heretofore stated the plaintiffs are not entitled to an injunction, but even if the statute were unconstitutional or the action of the Administrator unauthorized, they would not be entitled to the injunction which they seek for the reason that no legal right of theirs is infringed by any of the proposed actions of the County or of the Commissioner of public works. It is thoroughly settled that competition by a County or Municipality violates no right of a Public Service Corporation doing business therein which, as is the case of Plaintiffs here, has no exclusive franchise."

See also

Colorado Life Company v. Steele, 95 F. (2d) 535; Wright v. Mutual Life Insurance Company of New York, 19 Fed. (2d) 117.

In *Duke Power Company v. Greenwood,* 91 Fed. (2d) 665, it is held:

> "The Federal Public Works Administrator could not be enjoined at instant of power company from making loan and grant of federal funds to county for construction of electric power plant because of resulting competition, even if he was acting without authority; since federal government was not attempting regulation of company's business, county had right to engage in competing business, and no right of power company was infringed."

II.

The Court erred in holding in granting said motion for judgment on the pleadings that the contract between the City and Fairbanks, Morse & Company was invalid for the reasons:

(a) That the City could only construct a lighting plant by issuing bonds under the authority conferred by Section 5039.63 of the General Statutes, and

(b) That the contract was lacking in mutuality because of the provision therein that the contractor was not required to begin work until ten (10) days after the final determination of a Court that the appellee had no franchise.

The statute 5039.63 Rev. Code 1935 is as follows:

> "The city or town council has power: To contract an *indebtedness* on behalf of the city or town, and upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: Erection of * * * lighting plants * * *."

It is our contention that the statute is a grant of power and not a limitation of the means by which the power may be exercised. It applies only where an indebtedness is created. There is no indebtedness created here. There are two grants of power; one to borrow money for lighting plants, the other to issue bonds for lighting plants. Cities have no authority to issue bonds without express authority. *McQuillin on Municipal Corporations,* Section 2437, Revised Volume VI. Hence it was necessary to give authority if the municipality desired to finance waterworks or lighting plants by issuing bonds. This did not preclude the municipality from borrowing money without the issuance of bonds for any

public purpose. There is no provision or restriction in this statute preventing the city from acquiring or obtaining a municipal plant by other means than the issuance of bonds or the borrowing of money. The statute does not say that it shall only acquire a lighting plant by issuing bonds or by borrowing money. It puts no prohibition or limitation upon the authority, and it may provide itself with a lighting plant by any lawful means. It is inconceivable that the legislature should intend that a city must go into debt by borrowing money or issuing bonds for a lighting plant when it can acquire such a plant without becoming indebted, and without issuing bonds, by making the purchase price payable out of the earnings of the plant. That method of acquiring plants is and has been in common use in the United States for many years, and the law books are full of decisions where lighting plants have been acquired by that means, as witness:

Lang v. City of Cavalier, 59 N. D. 75, 228 N. W. 819;

Williams v. Village of Kenyon, 187 Minn. 161, 244 N. W. 558;

Davies v. Village of Madelia, 287 N. W. 1, 205 Minn. 526;

Carr v. Fenstermacher, 228 N. W. 114, 119 Neb. 172;

Johnston v. City of Stuart (Ia), 226 N. W. 164;

City of Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004;

Searle v. Town of Haxtun, 84 Colo. 494, 271 Pac. 629;

Bell v. City of Fayette, 28 S. W. (2d) 356, 325 Mo. 75;

Winston v. Spokane, 12 Wash. 524, 41 Pac. 888;

Shields v. Loveland, 74 Colo. 27, 218 Pac. 913;

Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365;

Seward v. Bowers, 37 N. M. 385, 24 Pac. (2d) 253;
Kelly v. Merry, 186 N. E. 425, 262 N. Y. 151;
Franklin Trust Company v. City of Loveland, 3 F. (2d) 114;
Underwood v. Fairbanks, Morse & Company, 185 N. E. 118, 205 Ind. 316;
Ward v. Chicago, 173 N. E. 810, 342 Ill. 167;
See also cases collected in 72 A. L. R. 687, and 96 A. L. R. 1385.

In addition to the powers granted to the city by Section 5039.63, it has the following other powers:

"The city or town is a body politic and corporate with the general powers of a corporation, and the powers specified or necessarily implied in this statute or any special laws heretofore enacted." Section 4955, Revised Codes, 1935.

"Every city and town has perpetual succession, may sue and be sued in all Courts and places and in all proceedings whatsoever, and may have and use a common seal, may purchase, receive, have and take, hold, lease, use and enjoy property of every name and description and dispose of the same for the common benefit, and such other powers as are incidental to municipal corporations not inconsistent with the laws of the United States or of this state." Section 5039.1, Revised Codes, 1935.

"To make and pass all By-laws, ordinances, orders and resolutions not repugnant to the constitution of the United States or of the State of Montana, or of the provisions of this title, necessary for the government or management of the affairs of a city or town, for the execution of the powers vested in the body corporate and for carrying into effect the provisions of this title." Section 5039, Revised Codes, 1935.

"To provide for lighting and cleaning the streets, alleys and avenues." Section 5039.6, Revised Codes, 1935.

"To make any and all contracts necessary to carry into effect the powers granted by this Code, and to provide for the manner of executing the same." Section 5039.62, Revised Codes, 1935.

"The city has authority to build or hire all necessary buildings for the use of the city or town, and to heat and light the same." Section 5039.4, Revised Codes, 1935.

Chapter 115 of the General Laws of Montana for the year 1937, as amended and extended by Section 10, Chapter 111, Laws of 1939, authorizes the construction of projects of any character eligible for loans under the provisions of the acts of Congress, known as "Emergency Relief and Construction Act of 1932," "The National Industrial Recovery Act", and authorizes the city councils to contract for the construction of any project to be paid for solely out of the earnings of such project. (The National Industrial Recovery Act is Chapter 90, Page 195, Volume 48 of the United States Statutes at Large.)

Under these powers, without reference to the provisions of 5039.63, the city has authority to erect a municipal lighting plant. In *Milligan v. Miles City,* 51 Mont. 374, 153 Pac. 276, the Court, after reciting certain of the above provisions, including the provisions of 5039.63 but without special reference to the latter, decided that a city in Montana has the power to install a lighting plant to supply light not only for its public buildings and streets, but also for use by its inhabitants. This is in accord with decisions in other jurisdictions where the city or town had more limited powers. For instance in *State, ex rel Buford v. Pinellas County Power Company,* 87 Fla. 243, 100 So. 504, it is held:

"Power to regulate, improve, alter, extend and open streets, to provide for the lighting of the streets of a city or town and to do and perform all such act or acts as should seem necessary and best adapted to the improvement and general interest of the town is sufficient to authorize the municipality to erect and maintain an adequate plant for supplying electric lights and power to the city and its inhabitants." (Citing the following cases: *Dillon on Municipal Corporations,* 5th Ed., Sec. 1302; *Lexington v. Lafayette County Bank,* 165 Mo. 671, 65 S. W. 943; *Gas Company v. Davenport,* 124 La. 22; *Greenville v. Greenville Water Works Company,* 125 Ala. 625; 27 So. 764; *Overall v. Madisonville,* 125 Ky. 684, 102 S. W. 278; *State, ex rel v. Tampa Water Works,* 56 Fla. 858, 47 So. 358, 19 L. R. A., N. S. 183.)

In *Juett v. The Town of Williamstown,* 248 Ky. 235, 58 S. W. (2d) 411, it is held that:

"A city either as an incident to its police power or under statutory authority 'to contract for supplying a city with water and light' may own and operate an electric light plant for the purpose of lighting the public streets and places, and as incidental thereto, may sell the surplus of its product to its inhabitants."

In *Overall v. Madisonville,* 125 Ky. 684, 102 S. W. 278, 281, 12 L. R. A., N. S. 433, it is held:

"Authority to own an electric light plant for the lighting of streets is conferred upon a municipal corporation by statutes empowering it to provide for the lighting of streets, and giving the council control of such works as the city may own for supplying light."

In that case it is further held that a municipal corporation having authority to own a plant for lighting its streets may

sell the surplus of its products to its inhabitants. The Court further said:

> "The public lighting of the streets of cities is of modern origin, yet the necessity for lights in a city is scarcely less now than its necessity for water * * *. It is found that light is not only essential to the safety of travelers to prevent their coming in contact with obstructions, but it performs a most valuable office in preventing crime. It is known that crime thrives best in darkness. A good light is the equivalent of a good policeman in preventing certain forms of crime. It is, therefore, universally held now that it is clearly within the police powers of cities, even without express authority, to provide public lighting of their streets at the public expense." (Citing *Crawfordsville v. Braden,* 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; *Mauldin v. Greenville,* 33 S. C. 1, 8 L. R. A. 291, 11 S. E. 4; *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; *Heilbron v. Cuthbert,* 96 Ga. 312, 93 S. E. 206.)
>
> "Where a city is given the power either expressly or by necessary implication as an incident to its police power to light its streets, and where the precise method is not expressly provided, it may either hire another to furnish the lights, or may furnish its own lights. The power to do the thing unreservedly gives the city discretion and the choice of means it will adopt." (Citing *Mauldin v. Greenville,* supra; *Smith's Modern Law of Municipal Corporations,* Sec. 881; *Henderson v. Young,* 119 Ky. 224, 83 S. W. 583; *Jacksonville Electric Light Company v. Jacksonville,* 36 Fla. 229, 30 L. R. A. 540, 18 So. 677; *Smith v. Nashville,* 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *Bridgeport v. Housatonic Railroad,* 15 Conn. 475; *Crawfordsville v. Braden,* 130 Ind. 149, 28 N. E. 849.)

In the *Crawfordsville case,* supra, it is said:

> "So far as lighting the streets, alleys and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. * * *. We see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light * * *. The corporation possessing, as it does, the power to generate and distribute throughout its limits the electricity for the lighting of its streets and other public places, we can see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do so is in our opinion a legitimate exercise of the police power for the preservation of property and health."

See also *Swann v. Murray,* 146 Ky. 148, 142 S. W. 244, *McQuillin on Municipal Corporations,* Sec. 1927.

In establishing, owning and operating a lighting plant, the city is exercising proprietory functions.

In *State v. Great Falls,* 19 Mont. 518, quoting from *Illinois Trust & Savings Bank v. City of Arkansas,* 76 Fed. 271, 22 C. C. A. 171, the Court said:

> "A city has two classes of powers; the one legislative, public governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city

itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked (the rule that the contract there considered was beyond the powers of the city). In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired, but in the exercise of the powers of the latter class it is controlled by no such rule because it is acting and contracting for the private benefit of itself and its inhabitants; *and it may exercise the business powers conferred upon it in the same way and in their exercise is to be governed by the same rules that govern private individuals* or corporations. (Authorities cited.) In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants but to obtain a private benefit for the city itself and its denizens * * *. The powers granted to this city by the legislature of the State of Kansas to contract for and procure water works are plenary and unlimited save but the duty to exercise them with reasonable discretion; and it is not in the province of the Court to contract or clip the legislative grant."

Under the powers conferred upon the city as above set forth, and the authorities cited, the city has power to establish a municipal light, heat and power plant, and in view of the broad power conferred upon the city to make contracts under Section 5039.62, it follows that it has authority to make the contract in question.

"Authority on the part of a municipal corporation to acquire property includes any usual mode of acquisition not prohibited by law." *43 C. J.,* Page 1337, Sec. 2097.

> "In the absence of express restrictions a municipal corporation may purchase property on credit as well as for cash." *43 C. J.,* Page 1338, Section 2097.

In *McQuillin on Municipal Corporations,* Sec. 366, Page 968, Volume I, it is said:

> "If power is conferred on a municipal corporation by statute and the law is silent as to the mode of exercising such power, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such powers shall be exercised; all the reasonable methods of executing such powers are inferred, subject, however, to the limitation that the action must be in good faith and neither arbitrary nor capricious. * * * In the absence of any mode prescribed by law, the council may, in its discretion, exercise its power in any usual or appropriate manner * * *. The municipal corporation may, in its discretion, determine for itself the means and methods of exercising its power."

The power conferred by Section 5039.63 is not the only power under which a lighting plant could be established in the city. Under Section 4958 the city "may purchase, receive and take, hold, lease, use and enjoy property of every name or description"; and "has such other powers as are incident to municipal corporations." Under Section 5039 the city has power "to make and pass all By-laws, ordinances, orders and resolutions * * * necessary for the government or management of the affairs of the city, for the execution of the powers vested in the body corporate and for carrying into effect the provisions of this title." Under Section 5039.7 it has authority "to provide for the lighting of streets," and also under Section 5039.6

and under Section 5039.4 it has authority "to build or hire all necessary buildings for the use of the city and to heat or light the same." No method of exercising these powers is prescribed or limited, and, therefore, the city can exercise them in any usual or customary manner. Conditional sales contracts are in common use and a customary method of acquiring property, and are, therefore, appropriate in this case. *Williams v. Village of Kenyon,* 187 Minn. 161, 244 N. W. 558. The authority conferred by Section 5039.63 is permissive only, and not exclusive. *Lang v. Cavalier,* 59 N. D. 75, 228 N. W. 819; *Williams v. Village of Kenyon,* 187 Minn. 161, 244 N. W. 558; *Carr v. Fenstemacher,* 228 N. W. 114, 119 Neb. 172; *Kelly v. Merry,* 186 N. E. 425, 262 N. Y. 151; *Farmers State Bank v. City of Conrad,* 100 Mont. 415, 47 Pac. (2d) 853.

In the *North Dakota case* the same contention was made as is here made that, because the statute authorizes the issuance of bonds for an electric light plant, that method excluded all others. The Court said:

> "Chapter 197 provides that cities may pay for such public utility in the manner therein set forth. Surely the city having the general power to own and operate such a public utility was not by this statute forbidden to acquire such utility by gift. Nor can we believe that it was intended thereby to forbid a city to purchase such a utility for cash if it had funds in its treasury otherwise lawfully available. Likewise, it seems to us that these provisions cannot be said to prohibit a city from creating a fund, such as the contract here in question contemplates, out of which a public utility may be purchased. Though it be conceded that the constitution, sec. 183, supra, prescribes and defines the character of the obligations secured solely by

> public utility properties which a city may issue and Chapter 197, Laws 1927 prescribes and defines the character of the indebtedness which a city may incur in order to provide a public utility, nevertheless neither the constitutional provision nor the statute above referred to purport to deny cities the right to purchase or erect such utilities where this can be done without incurring any debt or obligation."

In *Williams v. Village of Kenyon* it was also claimed that because statute authorized the issuance of bonds for lighting plants and provided that "no such erection, purchase or lease shall be made without approval by the voters of the Village such as is required by law for the issuance of Village bonds for like objects (and) the proposal so to do and the proposal to issue bonds to raise money therefor may be submitted either separately or as a single question" (Section 1229, General Statutes), there was no authority to erect a lighting plant except by means of a bond issue. The Court denied that contention, saying:

> "We think that what has been said above shows that since the power to acquire such a plant is expressly conferred, the means of accomplishing that object is left to the village so long as these are such as are customary and reasonable. It cannot be concluded because of the last quoted sentence of Section 1229 that the only way to acquire a plant is by a bond issue. If the village has the cash or some other property to give in trade or someone should wish to donate a plant, it could not be said that Section 1229 stands in the way."

In the *Minnesota case* the Court said, after reciting that the village had the powers of municipal corporations at

common law and quoting *I McQuillin on Municipal Corporations,* Section 124 to the effect that among the powers of municipal corporations at common law were perpetual succession, to sue and be sued and do all other acts as natural persons may:

> "Conditional sales contracts are entered into by natural persons and are in common use. Nothing in the statute so far quoted prohibits the village from using such contracts in dealing with personal property. The contract relates to proprietary powers of the village."

Cities in Montana have such "other powers as are incident to municipal corporations not inconsistent with the laws of the United States or the state." We take it that these are the powers of the municipal corporation at common law.

In *Carr v. Fenstemacher,* supra, there was a conditional sales contract payable from the receipts of the lighting plant as here, and the plaintiffs contended that the statutory methods of raising funds by means of taxation or by a bond issue excluded every other method, and that consequently the contract of purchase and the conditional sales warrant were void. The Court rejected this contention. The Court said:

> "A grant of power to a city may imply a means of exercising it in addition to specific statutory methods, without restriction as to others. In direct language, cities of the class to which Sargent belongs are specifically empowered in a single section of the Charter to purchase, construct, maintain and improve a lighting system. The Section next following provides that the cost of such a utility 'may' be defrayed by means of a tax levy, and if insufficient for the purpose, by a bond

issue. The word 'may' in the sense used does not necessarily mean 'shall'. If the city has on hand sufficient available money for that purpose resort to a tax levy or to a bond issue is unnecessary. *Christensen v. City of Fremont,* 45 Neb. 160, 63 N. W. 364. On precedent the power to raise funds for a lighting plant by the methods mentioned in the statute is not exclusive. Contracts beyond the power of a municipality are such that it cannot lawfully enter into for any purpose. *Stickel Lumber Company v. City of Kearney,* 103 Neb. 636, 173 N. W. 595. * * * *The City had power in some form to make the purchase. The method adopted was not specifically prohibited by law and does not seem to be illegal. The power to pay for or improve a lighting utility with available money on hand or with net earnings of the plant is implied by the general grant.*"

In *Kelly v. Merry,* supra, there was a taxpayer's action to restrain the carrying out of a conditional sales contract for the purchase of Diesel engines and other equipment for an electric light plant. The contract price of the engines was payable from the revenues of the lighting system in sixty (60) monthly installments, evidenced by pledge orders. The village law, Sec. 128-a, provided that no contract should be made involving an expenditure by the village unless the money therefor had been previously estimated by the Board of Trustees as necessary to be raised during the then fiscal year, or unless a resolution to borrow money on bonds or other obligations of the village had been adopted by the Board of Trustees. The Court said:

"The contract in question is a standard form used by the Diesel engine manufacturers known as the 'net revenue' form. The Courts of several states have had it under consideration. While it, or similar forms of

contract, has been upheld in several states (*Lang v. City of Cavalier,* 59 N. D. 75, 228 N. W. 819; *Mississippi Valley Power Company v. Board of Improvements,* 185 Ark. 76, 46 S. W. (2d) 32; *Barnes v. Lehi City,* 74 Utah 321, 279 Pac. 878). It has been condemned in *Indiana Service Corporation v. Town of Warren,* 180 N. E. 14; *VanEaton v. Town of Sidney,* 211 Ia. 986, 231 N. W. 475, 71 A. L. R. 820; *Hesse v. City of Watertown,* 57 S. D. 325, 232 N. W. 53, and elsewhere on the ground it goes beyond the scope of powers granted to the villages by the laws of those states. Local statutes vary as well as the grounds for judicial decision."

It was claimed by the plaintiffs that the contract involved an illegal expenditure of money because (a) the money had not been previously estimated by the Board of Trustees as necessary to be raised during the then fiscal year; (b) no resolution to borrow money on bonds or other obligations of the village had been adopted by the Board of Trustees, and (c) that the money is not otherwise available or specially provided for in the village law. Village Law, Section 128-a. The Court said:

"These are the only limitations on the powers of villages to make contracts for the expenditure of money for village purposes. *N. Y. Const.,* Article VIII Sec. 10. The establishment and maintenance of a village lighting system is unquestionably a village purpose, and the power to make contracts for the purchase of such equipment on credit necessarily follows in the absence of a prohibition. *Ketchum v. City of Buffalo,* 14 N. Y. 356. The Board of Trustees may do all acts expedient or desirable for the management of the business of the village, including the payment of money out of specific property or revenues (Village Law, Sec. 89, Subdivisions 37, 59, supra) so long as they are not

> inconsistent with law. Section 128 a, supra, contains nothing inconsistent with the purchase of equipment for a lighting system on credit without recourse to taxation or borrowing if the money is 'otherwise available', and it is otherwise available if it is payable out of specific revenues. * * * It makes no difference what else Village Law, Sec. 128-a, supra, prohibits or permits. If it does not prohibit the village from making this contract, it is ineffectual to check the exercise of judgment by the village board in contracting to make expenditures which the section permits. Village authorities are given power to be exercised according to their own ideas of policy. * * * The village law gives the widest discretion to the village board to make contracts for the expenditure of money for village purposes so long as it does not add to the burdens of taxation or borrow money on the obligations of the village, provided always that money is 'otherwise available' to meet the obligations of the village."

In *Farmers State Bank v. City of Conrad,* 100 Mont. 415, 47 Pac. (2d) 853, the city made a contract with the State Conservation Board similar to the contract here in question, wherein the board agreed with the city to install a pipe line from Lake Frances to the city's reservoir, a distance of about seven miles, in order to furnish the city with water from that source. The city agreed to pay to the Conservation Board the sum of $86,000 over a period of thirty (30) years at the rate of $6,000 per year with interest at three percent (3%) per annum, and upon payment of said amount out of gross receipts from the sale of water to the inhabitants, the board agreed to transfer the pipe line to the city. This is a conditional sales contract. The contract was upheld. No question was raised that the

city could not construct or cause to be constructed such a pipe line, except out of a bond issue or by borrowing money. The same provision of the statute, namely 5039.63, which it is claimed in this case prohibits the city from constructing a lighting plant except by a bond issue or by borrowing money, is applicable also to water works.

The case of *Whipps, et al. v. Town of Greybull,* 56 Wyo. 355, 100 Pac. (2d) 805, cited by the District Court in support of its decision, is different in its main feature from the case at bar. There the town had issued revenue bonds payable out of the future earnings of the plant to be constructed. The authority to issue "bonds" was required to be approved by the voters before the issuance. It was argued by the defendants that the word "bonds" meant "obligations payable from general revenues", but the Court held that revenue bonds came equally within the prohibition of the statute. The Court cited certain cases in support of its conclusion, and stated that the greater weight of authority was in favor of the contention of the plaintiff "that where a statute authorizes a city to acquire a lighting plant upon the credit of the city, or by borrowing money or by issuing bonds, such method is exclusive" (66). We emphatically assert that the greater weight of authority is with the contention that, where the statute simply authorizes the issuance of bonds or the borrowing of money for a lighting plant but does not expressly limit the erection of a plant to that method of financing, any other lawful method is permissible as has been shown by the cases hereinabove cited. The *Wyoming Statute* (Section 22-1601) *Revised Codes of Wyoming* for the year 1931, provides:

> "In addition to the powers provided by law, each incorporated city or town in the state shall have power first, to make local improvements, for which bonds *may be* issued to the contractor or be sold as hereinafter provided; * * * sixth, to establish, maintain and regulate electric light plants and electric power plants for the purpose of supplying the inhabitants with electric lights and power and to light the streets, highways and public buildings, and to supply power for water works and other municipal owned works and utilities." (It will be noted that we have quoted from the Revised Codes of Wyoming for the year 1931, which is the latest revision of the statutes.)

The words "may be" are used in the statute quoted the same as in *Lang v. Cavalier,* and in *Carr v. Fenstermacher,* supra, and that the words are not exclusive in meaning but merely permissive has been held in the cases cited. The Wyoming statute goes on to recite a long list of powers which, if the means of financing is exclusive, could only be exercised by bond issues or the borrowing of money. We think the method of financing was intended to be limited to the making of local improvements, such as the construction of roads, pavements, sewers, sidewalks, etc., for which bonds might be issued to the contractor in payment, and not to the construction of revenue producing utilities or instrumentalities. Some of the cases cited in the *Whipps case* and others to the same effect were considered by the Court in the case of *Williams v. City of Kenyon,* 187 Minn. 161, 244 N. W. 558, and were not followed, but a long list of cases were cited contra to which we refer the Court rather than encumber the record by producing them here. The cases were also considered in *Seward v. Bowers,* 24 Pac.

(2d) 253, in the concurring opinion of Justice Sadler, which opinion he wound up by saying:

> "So that for clearer-cut holdings sustaining the distinction, (that is whether or not contracts of this character are available for acquiring public utilities or improving them without creating a debt), we are confined to the Courts of California, Missouri and United States Court of Appeals of the Eighth Circuit. Against this line of decisions we find arrayed the Courts of the following jurisdictions, to-wit": (Citing cases from Washington, Utah, North Dakota, Kentucky, Illinois, Colorado, C. C. A. Seventh Circuit, and North Carolina.)

The cases cited by the Court in the *Whipps case* in support of its conclusions are on the off-side, and the language of some of them does not support the Court's conclusion. For instance, in *VanEaton v. Town of Sidney,* 211 Ia. 986, 231 N. W. 475, 71 A. L. R. 220, the Court says:

> "To the end that we may not be misunderstood we are not holding that a bond issue is the only method by which an improvement of this kind may be acquired or built."

The Court holds that the town had no authority "to pledge the rents, income and profits of the electric light plant to be constructed in the future". This case is off-set in the same jurisdiction by the case of *Johnston v. City of Stuart,* 226 (Ia.) N. W. 164.

The case of *Interstate Power Company v. Ainsworth,* 125 Neb. 419, 250 N. W. 649, holds that a municipal corporation is not authorized to purchase an electric light and power plant by pledging its future net earnings in payment,

and bases its conclusion principally on the case of *Van Eaton v. Town of Sidney.* The *Ainsworth case* is off-set in Nebraska by the *City of Carr v. Fenstermacher,* 228 N. W. 114, 119 Neb. 172.

The case of *Hesse v. City of Watertown,* 57 S. D. 325, 232 N. W. 53, had many features different from the case at bar, and turned on the question whether the bonds in said case were required to be submitted to the voters at an election, and authorized by them, and the decision holds that the bonds proposed to be issued created a debt, which question is not involved in the case at bar.

The case of *Tierney v. Cohen,* 198 N. E. 225, 268 N. Y. 464, is not applicable because the decision in that case was based upon the general city law of the State of New York, providing "that the city shall have no power to issue obligations to which it has not pledged its faith and credit for payment of principal and interest thereof."

In *Lassen Municipal Utility District v. Hopper,* 5 Cal. (2d) 18, 53 Pac. (2d) 347, the question of the authority of the Utility District to issue revenue bonds for a power project was at issue. The Court found that there was no authority under the various Municipal Utility District Acts to issue bonds, principal and interest of which should be payable from the revenue produced by the utility which will be acquired. The Utility District Acts required an election for the issuance of bonds under that act. The right to issue those kind of bonds, however, it appears from the decision, was recognized in the *California Toll Bridge Authority case,* 212 Cal. 298, 298 Pac. 485. In *Shelton v. City of Los Angeles,* 206 Cal. 544, 275 Pac. 421, also the validity of notes issued by a Board of Water and Power Commissioners to secure a loan on occurrence of an emerg-

ency under the Los Angeles City Charter, payable solely out of water revenues of the Board, were held legal.

The case of *State v. McWilliams,* 335 Mo. 816, 74 S. W. (2d) 363, is not applicable. The city proposed to issue revenue bonds but the law under which they were issued required the question to be submitted to and approved by a majority of the voters at a special election. This was not done. The case of *Fairbanks, Morse & Company v. City of Wagoner,* 86 Fed. (2d) 288, is not applicable because a constitutional provision limiting municipal indebtedness provides an exclusive method by which the city might finance the cost of an electric power plant. It confines this to current funds on hand or presently available from lawful tax levies already made, from current earnings or from proceeds of a bond issue authorized in accordance with the constitution.

The case of *Ahern, et al. v. Richardson County,* 256 N. W. 515, 127 Neb. 659, is not applicable. In that case the County Commissioners proposed to issue revenue bonds to construct a bridge. The Court held that in Nebraska Counties are not municipal corporations, and that they have no powers except such as are expressly granted, and there was no statutory authority for the County to issue bonds.

The case at bar is not a taxpayer's suit. While appellee alleges that it is a taxpayer, the allegation is denied, and moreover the action is not brought in a representative capacity as taxpayer. The contract in question is not payable out of taxes. It does not appear that the appellee will be affected in any manner in its property rights by this contract, and will not sustain any legal damages if the

contract be held valid. We do not see, therefore, how it has any right to maintain this action.

As to the other ground of invalidity of the contract claimed to exist because of want of mutuality (66-67), it seems to us there cannot possibly be any basis for a lack of mutuality. It seems to us that the District Court is begging the question (67) when it says, "If the Court is correct in holding that plaintiff has a franchise, then the contractor would not be obliged to construct the plant since the plaintiff could not be ousted as promised by the city and the contract." If the appellee is not ousted then the contract, by its own terms, is at an end. If it is determined that the appellee can be ousted, then the contract is in effect, and the appellant Fairbanks, Morse & Company is obliged to proceed.

The contract here in question is one upon condition.

> "The fact that a promise given for a promise is dependent upon a condition does not affect its validity." 13 C. J., Page 330, Sec. 178, and cases cited.

III.

The Court erred in holding and in adjudging that the appellee has a valid and existing franchise for the maintenance and operation of its electric light plant and system in said City.

This determination is based upon Section 6645 of the *Revised Codes of the State of Montana* for the year 1935, which section is as follows:

> "A telegraph, telephone, electric light or electric power line corporation or a person owning or operating such

is hereby authorized to install its respective plants and appliances necessary for service, and to supply and distribute electricity for lighting, heating, power and other purposes, and to that end to construct such telegraph, telephone, electric light or electric power line or power lines from point to point along and upon any of the public roads, streets and highways in the State of Montana by the erection of necessary fixtures, including posts, piers and abutments necessary for the wires, but the same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets or highways, *and nothing herein shall be so construed as to restrict the powers of the city or town councils.*"

The section has no clause repealing inconsistent acts or parts of acts.

With respect to streets, Cities of Montana have the following powers:

"To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same." Section 5039.5 Revised Codes, 1935.

"And to provide for and regulate street crossings, curbs and gutters, to regulate or prevent the use or obstruction of streets, sidewalks or public grounds by signs, poles, wires, posting hand bills or advertisements or any obstruction." Section 5039.7, Revised Codes, 1935.

"The City or Town Council has power to regulate or suppress the erection of poles and the stringing of wires, rods or cables in the streets, alleys or within the limits of any City or Town." Section 5039.42, Revised Codes, 1935.

"The Council must not grant a franchise or special privilege to any person, save and except in the manner

specified in the next section." Section 5074, Revised Codes, 1935.

"No franchise for any purpose whatsoever shall be granted by any City or Town or by the Mayor or City Council thereof to any person or persons, association or corporation without first submitting the application therefor to the resident freeholders whose names appear on the City or Town tax roll preceding such election." Section 5075, Revised Codes, 1935.

Sections 5076 and 5077 provide for the calling and holding of an election pursuant to the foregoing sections 5074 and 5075, and prescribe the form of the question to be submitted.

These powers are not repealed, but are in fact expressly reserved to the City, and, therefore, Section 6645 does not confer on an electric light or power line the right to occupy the streets in a City without obtaining a franchise or consent therefrom.

Even without the reservation of these powers to the municipality, a public utility cannot use the streets or alleys without the consent of the municipality, unless it is clearly apparent that such was the intention of the legislature. *McQuillin on Municipal Corporations,* 2nd ed., Section 1745, says:

"It is sometimes difficult, however, to determine whether the charter of a company or a statute actually confers authority to use the streets without the consent of the municipality, but statutes granting a franchise to a public utility company including therein a general right to use the streets and alleys of a municipality or municipalities should not be construed as an express grant of the right to use such streets or alleys without the consent of a municipality unless it is clearly apparent that such was the intention of the legislature."

Such intention does not appear in the Section quoted, but on the contrary the intention appears that the powers of the municipality over its streets are reserved to it.

The statute in question does not fix any time for the use of the streets or impose any terms, provisions or conditions on the grantee, and it is well known that franchises do ordinarily contain a provision as to the time during which the franchise shall be exercised, and also other terms, provisions and conditions regulating the use of streets by the utility, none of which is contained in the statute. From which it can be reasonably and fairly inferred that the determination and imposition of such matters was left to the discretion of the municipality. It is inconceivable that a legislature would give *carte blanche* to public utilities to use the streets of the municipalities of the state at their own free will, and without restrictions or regulations of any kind.

The powers of the city expressly reserved to them are not mere police powers; they are powers of control, prevention and prohibition. In *Broad River Company v. South Carolina,* 281 U. S. 537, 548, 50 Sup. Ct. 401, the Court said:

> "The very fact that legislative acts of this character are commonly prepared by those interested in the benefits to be derived from them, and that the public interest requires that they should be in such unequivocal form that the legislative mind would be impressed with their character and import, so that the privileges may be intelligently granted or purposely withheld has firmly established the rule that they must be strictly construed, and that any ambiguity or doubt as to their meaning and purpose must be resolved in

favor of the public. (See *Blair v. Chicago,* 201 U. S. 200; *Northwestern Fertilizing Company v. Hyde Park,* 97 U. S. 659, 666.) 'The rule is a wise one which serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus brings about open dealings with legislative bodies.' (*Slidel v. Grandjean,* 111 U. S. 412)."

In the case of *Mitchell v. Dakota Central Telephone Company,* 25 S. D. 409, 127 N. W. 582, it is held that where the consent of the local authorities is required such authorities may impose conditions of consent, and among those may be the limitation of the franchise to a certain number of years, and it may also impose a requirement that the utility pay to the city ten percent (10%) of its gross receipts over and above a specified amount. (Citing a large number of cases.)

In *Town of Seaford v. Eastern Shore Public Service Company,* 21 Del. Ch. 214, 191 Atl. 892, it is held that where the consent of the local governmental agency is required it is in the power of the latter to impose terms and conditions upon which its consent is granted; however onerous they may be, these are matters in the discretion of the responsible local officials.

It appears from the answer in this case that a franchise was originally granted by the Town of Forsyth to John E. Edwards for a period of twenty (20) years. John E. Edwards subsequently organized a corporation which took over the franchise. The duration of the corporate existence of said corporation was twenty (20) years. The appellee succeeded to whatever rights said corporation had, but the franchise originally granted has long since expired.

After the termination of a franchise no right to operate a plant exists unless the municipality does something that would estop it from asserting no such right exists. The fact that the power company was permitted to operate after expiration of the franchise until its contract for street lighting expired gives it no renewal rights. *State, ex rel. v. Arkansas, Missouri Power Company,* 93 S. W. (2d) 887, 339 Mo. 15.

A brief history of Section 6645 will demonstrate that the appellee has no franchise.

Section 14, Article 15, of the Constitution of Montana granted to any person or corporation the right to construct or maintain telegraph and telephone lines within the State, and provided that the legislature should by general law enact reasonable regulations to give full effect to such grant. In conformity therewith the legislature enacted a law which appears as Section 1000 of the Civil Code of Montana for 1895. Said Section provided:

> "A telegraph or telephone corporation or a person is hereby authorized to construct such telegraph or telephone line or lines from point to point along and upon any of the public roads by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, but the same shall not incommode the public in the use of said roads or highways."

This act was in strict compliance with the constitutional provision. In 1905 (Chapter 55, Laws of 1905), the legislature amended said Section 1000 so as to provide that telegraph, telephone, *electric light or electric power line corporations* or a person owning or operating such were

authorized to construct their lines upon the public roads and highways of Montana, but contained the clause that:

> *"The provisions of this act shall not apply to public roads and highways within the limits of incorporated cities or towns."*

The act as amended in 1905 did not give electric light and power companies any right to construct their lines within the limits of incorporated cities or towns, nor was there any right from the state prior thereto. On the 10th of September, 1904, John E. Edwards, the appellee's assignor, by *mesne* conveyances, applied for and obtained a franchise from the Town of Forsyth for a period of twenty (20) years. In April 1905, after the passage of the 1905 amendment, one, W. H. Crumb, made a demand on the Mayor and Council of the City of Helena to designate places in and upon the streets of the City for the erection of poles and fixtures *for the installment of a telephone system.* The demand was refused and an alternative writ of mandamus was issued which was quashed in the lower Court. An appeal was taken to the Supreme Court, and it was there contended that inasmuch as the constitution gave telephone companies the right to construct their lines within the state, the law of 1905 limiting the right to construct such lines outside the municipalities was unconstitutional so far as telephone companies were concerned. An examination of that case (*State, ex rel. Crumb v. City of Helena,* 34 Mont. 67) will disclose that there was nothing litigated in that case but the right of the telephone company to use the streets of the City of Helena for its poles and wires without the consent of the city. The Court said:

"The (constitutional) grant was not intended merely to enable telephone and telegraph lines to be constructed and maintained for the purpose of ornamenting railroad lines or public roads in county districts, but to enable the telegraph and telephone business as such to be conducted in this state."

It further stated:

"A statute which provides that a corporation or individual seeking to erect and maintain a line of telephone and engage in the telephone business may erect and maintain such telephone lines along the public roads and highways outside of incorporated cities and towns only, and which leaves the cities and towns free to refuse to enact legislation upon the subject, and thereby prevents such business being conducted within those municipalities, does not give full effect or any practical effect to the grant contained in Section 14, Article 15 above."

It quoted from the case of *State, ex rel. Telephone Company v. Mayor,* 30 Mont. 338, 76 Pac. 758, as follows:

"If the subordinate divisions of the state are vested with the authority of preventing the constructing of these lines (meaning telephone lines), or of imposing restrictions which will have that effect, then the legislature has not complied with the constitutional command."

It will thus be seen that the case concerned telephone companies alone, and that the question of the right of the *electric light and power companies* to construct and operate their lines within municipalities was not in issue. The Supreme Court held that the statute was unconstitutional in so far as it did not permit telephone companies to con-

struct and operate their lines within municipalities, but it did not hold it unconstitutional in so far as electric light and power companies were concerned, and could not well do so; first, because their rights were not in issue, and, second, because such companies have no constitutional authority to construct their lines within the municipalities without getting a franchise from them. The Court did not hold the entire act unconstitutional. It said:

> "*In so far as the act of 1905 fails to meet the requirement of Section 14, Article 15 of the Constitution it is invalid. It is not necessary to consider in this case whether the whole of the act of 1905 above is inoperative. The proviso is* and so far as this appellant is concerned, his rights are the same whether they be measured by the act of 1905 or by Section 1000 of the Civil Code. With the proviso eliminated from the act of 1905, the conditions presented in this case are the same as in the *Red Lodge case,* and the decision rendered therein is conclusive of this appeal."

In view of the fact that the litigation only concerned the rights of telephone companies the reference to the proviso should be and was intended to be limited to such companies so far as eliminating them from the proviso.

The *Red Lodge case* (*State, ex rel. Telephone Company v. Mayor,* 30 Mont. 338, 76 Pac. 758) was decided in 1904 when the statute that governed the rights of telephone companies was Section 1000 of the Civil Code, which Section gave telegraph and telephone companies authority to construct their lines along and upon any of the public roads of the state, and the rights of telephone companies were all that was determined or intended to be determined

in the *Crumb case*. In the *Helena case* (34 Mont. 67, supra), the Court said:

> "The question presented for determination here is, 'Does the act of 1905 violate the mandate of the constitution contained in Section 14, Article 15 above?' This section of the constitution is not self-executing. Legislation must be had to make the right granted effective. If the legislature failed or refused to enact any measure on the subject at all, then the right granted would simply lie dormant for it must be conceded that there is not any power which can coerce the legislature into enacting a particular law * * *. In the absence of legislation it would be an unlawful obstruction of any public highway to place poles, posts or other fixtures for the use of telephone or telegraph lines in it * * *. If, however, the legislature does act, the law which it enacts must be a general one of uniform operation, providing reasonable regulations which will give full effect to the grant contained in the section of the constitution quoted above."

It will thus be seen that there was nothing at issue but the right of telephone companies to use the streets of the municipalities for their poles and wires, and the Court held that in view of the constitutional grant the legislation which prevented them from doing so was unconstitutional. The decision, by its very terms, states that in so far as the statute failed to meet the requirements of the constitutional provision it was invalid. That was all that was necessary to the determination of the case, and that was all that was at issue. It was invalid only as respects the rights of telephone companies, leaving the restrictions of the act still applicable to electric light and power companies. We contend that the act remained in force and effect except in so

far as telephone companies were concerned, and that as to those the provision preventing them from using the streets and roads of municipalities without municipal consent was invalid. No question was raised respecting electric light companies.

> "A statute may, however, be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected, and this rule applies even though the constitutional and unconstitutional parts are in the same section of the act." 59 C. J. Section 205, page 639; citing among numerous other cases *State v. Courtney,* 71 Pac. 308, 27 Mont. 378.
>
> "In some jurisdictions the Courts apply the principle of severance liberally so as to sustain an act if possible, while in others the doctrine is not favored and is applied with hesitation." 53 C. J., page 642, Sec. 205.

In the foot note it is said:

> "The whole tendency, during recent years at least, in this Court has been to apply the principle of severance with increasing liberality." *People v. Mancuso,* 175 N. E. 177, 255 N. Y. 463, 473.

In *Dunn v. City of Great Falls,* 13 Mont. 58, 31 Pac. 1017, the law is stated as follows:

> "If when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent wholly independent of that which was rejected, it must be sustained." *Hill v. Rae,* 52 Mont. 378, 158 Pac. 826.

In *State, ex rel. District Court,* 56 Mont. 464, 468, 185 Pac. 157, the Court said:

> "If it is possible to eliminate the invalid portion (of a statute) without destroying the entire statute, it must be done." *Hamilton v. The Board,* 54 Mont. 301, 169 Pac. 729.

It can be done in this case.

After the decision in the *Helena case,* Chapter 192, Laws of 1907 was passed amending Section 1000 of the Civil Code of Montana of 1895 as amended by an act of the Ninth Legislative Assembly of Montana, approved March the 2nd, 1905, so as to read as follows, making the act read the same as Section 6645 above quoted, containing the provision:

> "Nothing herein shall be so construed as to restrict the powers of city or town councils."

That provision must be given force and effect. When the unconstitutional part of the act of 1905 is eliminated, the act remains in force as to electric power lines or power line corporations so that they cannot use the streets of municipalities without municipal consent. As hereinbefore stated, there is no repealing clause in the Act of 1907, so that the powers of the City Council over its streets and alleys including the consent of the city required under the 1905 act and the act of 1907 remain in full force and effect, and preclude any electric company from using the streets of the municipality without the consent of the governing body of the city. Therefore, it is fair to conclude that the appellee in this case has no franchise by virtue of Section

6645 to use the streets of the appellant city without its consent, and which consent it has not obtained.

CONCLUSION.

In the operation of public utilities a municipality is governed by the same law as individuals. It is liable for negligence the same as an individual. An individual can make a contract of this kind. Why should not this municipality, acting in its business or proprietary capacity, be permitted to do it? It contravenes no constitution, statute, ordinance or other provision of law. No sound reason of public policy militates against it. Every sound reason of business and economics is in favor of it, for a public utility should be self-supporting. The risk of loss is thrown entirely upon Fairbanks, Morse & Company. If the City realizes earnings sufficient to pay for the plant, the Company gets paid and the City gets the plant. If there are not sufficient earnings, the Company does not get paid. It takes the chances, and the City takes none. If there is an eventual default all the Company can do is to take out part of its plant. It cannot remove the real estate. In the meantime the City has the use and benefit of it. It is conceded that it may pay for it by a bond issue or by taxes. If by a bond issue or by taxes, it is increasing the burden of taxation for itself and its citizens, and takes all the risks. If it can pay for it out of earnings, it takes no risks and it lightens the burden of all taxpayers. Besides the City and its inhabitants can take pride in having a civic enterprise of this kind, owned by the municipality. The appellee will not sustain any loss or damage if an injunc-

tion is denied. Its taxes will not be increased. If it loses its business in the City, it is *damnum absque injuria,* and that is a loss which everyone must take the chances of from competition. There are no equities whatever in the favor of the appellee. All of the equities are in favor of the City. The City is merely exercising its business powers, which are common to individuals in the same line of business. Its inherent powers with respect to this utility authorize it to do all such acts as natural persons may. In order to compete it must have the same right and freedom of contract as individuals or corporations. The voters of the City have authorized the execution of the contract in question, and the establishment of a light plant in the way provided for therein. Moreover it is inconceivable why any person be he taxpayer or otherwise should demand that the equipment should be made payable out of taxes instead of out of its own earnings.

In *Swanson v. City of Ottumwa,* 118 Ia. 161, 189, 91 N. W. 1048, it is said:

> "The right of a city to construct and own works of public utilities, if such right exists, is one of great importance and should not be embarrassed or rendered nugatory by strained or technical construction of the constitution or of the statutes. Its importance is not so much in the fact that public ownership is in itself wise or desirable (concerning which there may be much difference of opinion) as in the fact that with

such power in reserve municipalities are placed in positions to deal with private owners on equal terms and avoid exactions which their helplessness might otherwise invite."

The decision should be reversed and the case dismissed.

Respectfully submitted,

H. V. Baman

Attorney for City of Forsyth,
Residence and Post Office Address:
Forsyth, Montana.

John P. Kyle Richard E. Kyle

Attorneys for Fairbanks, Morse & Company,
Residence: St. Paul, Minnesota.
Post Office Address: 618 Guardian Bldg.

POPPENHUSEN, JOHNSTON, THOMPSON
& RAYMOND,

C. H. Poppenhusen Arthur Raymond

of counsel,
Chicago, Illinois.